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Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL BURNELL MARLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2401(b) establishes a six-month statute of limitations for damage actions brought against the United States under the Federal Tort Claims Act. Is this statute of limitations:

(1) jurisdictional, and therefore a bar to the application of equitable limitations, as the Ninth Circuit has held;

(2) not jurisdictional, and therefore not a bar to the application of equitable limitations, as the First, Third, Fifth, and Sixth Circuits have held; or

(3) jurisdictional, but also not a bar to the application of equitable limitations, as the Eighth Circuit has held?

PARTIES TO THE PROCEEDINGS

Petitioner Michael Burnell Marley is the sole plaintiff in this action for damages brought under the Federal Tort Claims Act. Respondent United States of America is the sole defendant.

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Petitioner Michael Burnell Marley respectfully prays that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the Ninth Circuit of December 8, 2008, and June 1, 2009.

OPINIONS BELOW

The June 1, 2009 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 567 F.3d 1030, and reproduced at pages 1 through 18 of the Petition Appendix ("App."). The December 8, 2008 opinion of the Ninth Circuit is reported at 548 F.3d 1286, and reproduced at App. pages 19 through 34. The decision of the District Court granting the motion of the United States to dismiss Marley's action is unreported, and reproduced at App. pages 35 through 44. The decision of the District Court granting the motion of the United States for partial reconsideration is unreported, and reproduced at App. pages 46 through 48.

JURISDICTION

The original opinion of the Ninth Circuit was issued on December 8, 2008. Marley timely petitioned for a rehearing *en banc*. The amended opinion of the Ninth Circuit and the order denying rehearing were both issued on June 1, 2009. This Court has

jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute of limitations for tort claims brought under the Federal Tort Claims Act states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within ns after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which is was presented.

28 U.S.C. § 2401(b).

STATEMENT OF THE CASE

This case involves a conflict over whether 28 U.S.C. § 2401(b), the six-month statute of limitations governing damage actions brought under the Federal Tort Claims Act ("FTCA"), is jurisdictional and therefore a bar to the application of equitable limitations such as equitable tolling and equitable estoppel. The Ninth Circuit held that it was, and therefore affirmed the dismissal with prejudice of Petitioner Marley's action for damages brought under the FTCA.

Marley, a veteran, was treated for prostate cancer by doctors of the Veterans Administration ("VA"). Marley contends he was the victim of medical malpractice at the hands of these doctors, whose treatment of the cancer left Marley permanently and painfully injured.

Marley timely filed an administrative claim with the VA, which it rejected on October 22, 2004. Marley filed an action for damages on March 3, 2005, thereby complying with the requirement of § 2401(b) that such an action be commenced within six months of the denial of the plaintiff's administrative claim.

In late 2005 Marley's counsel moved to withdraw when they could not locate an expert witness necessary to establish an essential element of Marley's claim.[1] The District Court granted counsel's motion to withdraw on January 3, 2006, and notified Marley that he was now personally responsible for pursuing his action in accordance with the court's scheduling order.

Soon thereafter (on January 27), an Assistant United States Attorney ("AUSA") wrote to the now

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[1] Marley's counsel took this step to avoid violating their obligations under Federal Rule of Civil Procedure 11 and Washington State's Rules of Professional Conduct (which apply in the District Court before which Marley's case was pending). Although counsel's motion to the District Court did not state the reason for the request to withdraw, the Government has never disputed that the inability to locate a required expert witness was in fact the reason for the request.

unrepresented Marley about whether he might be interested in dismissing his case. The AUSA provided Marley with a proposed form of a stipulated dismissal of his case "without prejudice," under Federal Rule of Civil Procedure 41. The AUSA also gave Marley advice as to what such a stipulated dismissal would mean:

> If you're not familiar with the legal terms involved, and in case you don't want to consult another lawyer (which is entirely your right), I'll briefly state my opinion as to what they mean.
>
> . . . This stipulation provides that your case would be dismissed "without prejudice." This means you could (in theory) bring it again at a later date. The other option would be dismissing "with prejudice," which would mean you could not bring it again. But please be aware that even if you dismiss now "without prejudice," there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again.

See Marley, 567 F.3d at 1033, App. 4-5, quoting the letter, App. 52-54.

The AUSA's advice omitted two material facts. First, by the time of the Government's letter, the § 2401(b) six-month limitations period had already run (specifically, by the end of April 2005). Second, under well-established Ninth Circuit case law, the dismissal of Marley's case under Rule 41, even though

expressly designated "without prejudice," would mean that Marley's earlier filed complaint of March 2005 would not count in determining whether a later refiled action complied with the § 2401(b) limitations period. *Concha v. London*, 62 F.3d 1493, 1505-1506 (9th Cir. 1995) (citing *Brown v. Hartshorne Public School District No. 1*, 926 F.2d 959, 961 (10th Cir. 1991)) (a dismissal without prejudice under Fed. R. Civ. P. 41 "leaves the parties as though no action had been brought"). Thus, under controlling precedent, if Marley signed the Government's proposed dismissal he would be barred from recommencing his action – at least unless equitable tolling or estoppel applied.

Unaware of these critical facts, Marley signed the stipulation and returned it to the AUSA, who then signed on behalf of the Government and filed it with the District Court.[2] The District Court dismissed Marley's action pursuant to the stipulation, by an order entered on February 27, 2006. *Marley*, 567 F.3d at 1033, App. 22; Order on Stipulation for Dismissal, App. 57-62.

On March 15, 2006, Marley's former counsel reappeared and refiled Marley's action, having located the required expert witness only after the original case had been dismissed. The Government

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[2] The AUSA sent a second letter to Marley (dated February 14, 2006) regarding the proposed stipulated dismissal, but that letter did not address the advice previously provided. App. 55-56.

moved to dismiss the refiled action on the ground it was untimely under § 2401(b). In its motion the Government pointed out – as it had not in its letter to Marley – that the statute's six-month limitations period had run prior in the Spring of 2005, and argued that under "hornbook law" a voluntary dismissal without prejudice "leaves the parties as though the action had never been brought[,]" rendering the refiled action untimely under § 2401(b). *See* United States Motion to Dismiss at 5 (Clerk's Record No. 18-1, W.D.Wash. No. C06-0366RSL). Marley opposed the motion on the grounds of equitable tolling and estoppel, submitting a declaration in which he stated he would never have agreed to the proposed stipulated dismissal had he been told that a refiled action would be deemed untimely under § 2401(b). *See* Marley Decl. at 2 (unnumbered paragraph 6), App. 50.

The District Court dismissed, finding that Marley had failed to establish grounds for relief under either equitable doctrine. *See* Order Granting Motion to Dismiss, App. 39-44. The District Court initially rejected the Government's claim that § 2401(b) was "jurisdictional," and therefore a bar to the application of equitable tolling or estoppel, but later withdrew that portion of its ruling at the Government's request. *See* Order Granting Motion for Partial Reconsideration, App. 46-48.

Marley appealed. The Ninth Circuit did not reach the merits of Marley's tolling and estoppel claims, instead holding that "because § 2401(b) is

jurisdictional, we must refrain from using equitable estoppel or equitable tolling to excuse Plaintiff's untimeliness." *Marley*, 548 F.3d at 1292, App. 15 (citation omitted). Marley timely petitioned for rehearing *en banc*. The Merits Panel amended its opinion[3] but adhered to its ultimate determination that § 2401(b) is jurisdictional and "consequently . . . equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply." *Marley*, 567 F.3d at 1032, App. 3. A majority of the full court's active, nonrecused members voted to deny rehearing. *Id.*, App. 2 (order on denial of rehearing).[4]

REASONS FOR GRANTING THE WRIT

This case presents a clearly established conflict regarding the nature of the statute of limitations governing tort claims brought against the United States of America under the Federal Tort Claims Act. Four circuits (the First, Third, Fifth and Sixth) have held the statute is not jurisdictional; district courts in those circuits therefore are free to apply equitable

[3] The amendment addressed points raised by Marley's rehearing request regarding the proper handling of intracircuit panel decision conflicts, which do not bear upon the question presented by this petition.

[4] Under Ninth Circuit procedure, the number of votes cast in favor of rehearing are not disclosed unless there is an opinion dissenting from the denial of rehearing. The form of the court's order indicates that one or more judges voted in favor of rehearing.

limitations when that statute of limitations is raised. Another circuit (the Eighth) has held that, although the statute is jurisdictional, equitable limitations may still be applied. Now in this case the Ninth Circuit has held that the statute is jurisdictional and that this conclusion bars the application of equitable limitations. The resulting three-way conflict on this important question of federal law should be settled by this Court.

I. The Decision of the Ninth Circuit, Holding that the Statute of Limitations Governing Actions Brought Under the Federal Tort Claims Act Is "Jurisdictional" And Therefore Bars the Application of Equitable Limitations, Conflicts with Decisions of the First, Third, Fifth, Sixth, and Eighth Circuits.

In affirming the District Court's dismissal of Marley's action, the Ninth Circuit held that a federal court cannot apply equitable limitations in an action brought under the Federal Tort Claims Act because the statute of limitations governing such actions is "jurisdictional":

> We must decide whether the statute of limitations in § 2401(b) of the Federal Tort Claims Act . . . is jurisdictional and, in turn, whether courts can employ the doctrines of equitable estoppels or equitable tolling to extend the limitations period. *We hold that the statute of limitations in 28 U.S.C.*

> *§ 2401(b) is jurisdictional and, consequently, that equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply*. Accordingly, we affirm the district court's judgment, which dismissed this action.

567 F.3d at 1032, App. 3 (emphasis added). This holding creates a three-way conflict with the decisions of the other circuits that have addressed the nature of § 2401(b)'s limitations period since this Court in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), established a rebuttable presumption that statutes of limitations against the United States are subject to equitable tolling.[5]

First, the Ninth Circuit's decision conflicts with the decisions of four circuits (the First, Third, Fifth and Sixth) that have held § 2401(b) is not jurisdictional and that equitable limitations therefore can be applied in Federal Torts Act Claim cases:

- *Rakes v. United States*, 442 F.3d 7 (1st Cir. 2006):

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[5] *Irwin* involved equitable tolling. This Court has reserved the question of whether the United States should also be subject to equitable estoppel. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government"). The Ninth Circuit recognized the availability of equitable estoppel against the United States in *Watkins v. United States*, 875 F.2d 699 (9th Cir. 1989) (*en banc*). Marley sought relief on both grounds.

> Because 28 U.S.C. § 2401(b) provides no express exceptions to the two-year time limit that begins once a claim accrues, the question is whether tolling is implicitly permissible. The twin poles of the analysis we must undertake to answer the question are the Supreme Court's decisions in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 . . . (1990), and *United States v. Brockamp*, 519 U.S. 347 . . . (1997).
>
> . . . .
>
> Unlike the statute at issue in *Brockamp*, the FTCA's limitation provision speaks in clear and simple terms of its time limitation. In this regard, it is far more like the provision at issue in *Irwin*. . . . . [W]e conclude that *fraudulent concealment and duress are both available for tolling FTCA claims.*

442 F.3d at 24-25 (emphasis added) (adopting rule while affirming dismissal).

> • *Hughes v. United States*, 263 F.3d 272 (3d Cir. 2001):
>
> . . . the same rebuttable presumption of equitable tolling applicable to private defendants applies to suits against the United States. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 . . . (1990). Thus, *the FTCA's statute of limitations is not jurisdictional*. Failure to comply with the statute is "an affirmative defense which the defendant has the burden of establishing. *See* Fed. R. Civ. P. 8(c)."

> *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991).

263 F.3d at 278 (emphasis added) (adopting rule, reversing dismissal and granting relief on equitable tolling grounds).

> • *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999):
>
> [N]either of the factors identified in *Brockamp* as supporting a conclusion that . . . [§ 2401(b) i]s jurisdictional applies.
>
> First, Section 2401 is a garden variety limitations provision, without the attention to detail . . . that suggest[s] preemption of equitable remedies.
>
> . . . .
>
> Second, allowing equitable tolling would not create an administrative nightmare for the FTCA regime[.] . . . Thus, *where the principles of equitable tolling would ordinarily apply, such tolling should be allowed in an FTCA case.*

167 F.3d at 917 (emphasis added) (adopting rule, reversing dismissal and granting relief on equitable tolling grounds).

> • *Glarner v. United States*, 30 F.3d 697 (6th Cir. 1994):
>
> [T]he [Veteran's Administration] . . . first argues that the doctrine of equitable tolling cannot apply to § 2401(b) because the latter

> is a jurisdictional statute of limitations that cannot be equitably tolled. This assertion is incorrect.
>
> . . . .
>
> The government relies on *Dean v. Veterans Admin. Regional Office*, 943 F.2d 667 (6th Cir. 1991)[.] . . . In that case, the court found that 5 U.S.C. § 7703(b)(2), governing judicial review of decisions of the VA Merit Systems Protection Board, could not be equitably tolled despite *Irwin*. In doing so, the court looked to the text of the particular statute, which stated that "[n]otwithstanding any other provision of law," a case must be filed within 30 days of receiving notice. *Id.* at 670. Congress rebutted the presumption of equitable tolling. Nothing in *Dean*, however, implies that Congress rebutted this presumption when it enacted § 2401(b). Thus, . . . *§ 2401(b) can be equitably tolled.*

30 F.3d at 701 (emphasis added) (adopting rule, vacating dismissal with allowance to refile on equitable tolling grounds).

Second, the Ninth Circuit's decision conflicts with the decision of the Eighth Circuit in *T.L. v. United States*, 443 F.3d 956 (8th Cir. 2006), in which the Eighth Circuit held that, although § 2401(b) is a "jurisdictional" limitation, federal courts nonetheless should be allowed to apply equitable limitations:

> As *Brockamp* illuminates, the rule of equitable tolling applies in FTCA cases only

> because Congress intended it to apply. It is thus one of the "terms" of the government's consent to be sued, [*United States v.*] *Sherwood*, 312 U.S. [584,] . . . 586 (1941), . . . and *there is no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling.*

443 F.3d at 961 (adopting rule while affirming dismissal).[6]

Subsequent to the first Ninth Circuit decision in this case, the Third Circuit, in *Santos v. United States*, 559 F.3d 189 (3rd Cir. 2009), expressly reaffirmed its decision in *Hughes v. United States* (*supra*) that § 2401(b) is not jurisdictional. In rejecting the Government's urging to repudiate *Hughes*, the Third Circuit concluded:

> [W]e cannot in all circumstances preclude equitable tolling of the statute of limitations in FTCA actions because if we did so we unjustifiably would take upon ourselves the authority to narrow the congressional waiver of the sovereign immunity of the United States.

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[6] The Second and Fourth Circuits have assumed the applicability of equitable limitations in FTCA actions without expressly addressing the question of whether § 2401(b) is jurisdictional. *See Valdez v. United States*, 518 F.3d 173 (2d Cir. 2008) (reversing dismissal); *Kokotis v. United States Postal Service*, 223 F.3d 275 (4th Cir. 2000) (affirming dismissal).

559 F.3d at 197. In dissenting from the *Santos* majority's conclusion that the district court in that case had erred in refusing to apply equitable tolling, Judge O'Neill observed that "whether in any circumstance there can be equitable tolling of the FTCA's limitations period . . . has created a significant circuit split":

> [A] substantial circuit split exists on whether the FTCA is jurisdictional and whether equitable tolling applies. . . . . *A definitive Supreme Court holding on this issue would eliminate the confusion and permit the law to be applied uniformly.*

559 F.3d at 204-205 (dissenting op. per O'Neill, Jr., District Court judge sitting by designation) (emphasis added).

II. Whether the Statute of Limitations Governing Actions Brought Under the Federal Tort Claims Act Should be Deemed "Jurisdictional," And Therefore a Bar to the Application of Equitable Limitations, Is An Important Question of Federal Law That Should Be Settled By This Court.

In its petition for rehearing in *Santos*, the Government correctly observed that whether the limitations period of the Federal Tort Claims Act is jurisdictional, and therefore a bar to the application of equitable limitations, is a question of "exceptional importance." *See* Petition for Rehearing and Rehearing *En Banc* of the United States in *Santos v.*

United States, 3rd Cir. No. 07-4613, Doc. No. 00319576440 (filed April 27, 2009) (Required Statement Of Counsel Pursuant To 3rd Circuit L.A.R. 35.1). On this point, Marley and the Government agree.

Until this Court's decision in *Irwin v. Dep't of Veteran Affairs*, federal courts could not apply equitable tolling in actions against the United States. In *Irwin*, this Court established a rebuttable presumption that Congress intended that the United States, in matters pertaining to the equitable tolling of statutes of limitations, should be treated the same as a private party defendant would be. 498 U.S. at 95. Until the Ninth Circuit's decision in *Marley*, every circuit to have considered the matter since *Irwin* had concluded that the presumption that equitable tolling applies against the United States controlled for actions brought under the FTCA.

The Ninth Circuit reasoned that this Court's decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S.Ct. 750 (2008), had modified the rule in *Irwin*. In *John R. Sand & Gravel*, this Court held that compliance with the six-year statute of limitations governing claims brought before the Federal Court of Claims (28 U.S.C. § 2501) is a "jurisdictional" requirement that could not be waived by the United States. 128 S.Ct. at 752. *John R. Sand & Gravel* rested largely on the principle of *stare decisis*. The Court had treated § 2501 as jurisdictional in a series of earlier cases extending back over several decades; it concluded that the plaintiff had

failed to demonstrate that this well-settled interpretation should be abrogated. *See* 128 S.Ct. at 757 ("To overcome a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations.").

As the Government recognized in seeking a rehearing in *Santos*, whether § 2401(b) should be treated as jurisdictional, and whether the federal courts therefore are barred from applying equitable limitations in FTCA damage actions, is an important question of federal law that should be settled by this Court. The facts of this case illustrate the potential for injustice if federal courts are deprived of the ability to apply equitable limitations in FTCA damage actions. Nor is this the only instance of such problems.[7] Whether the federal courts should be

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[7] *See, e.g., Hughes*, 263 F.3d at 275 (limitations period tolled because of failure by VA doctors to advise plaintiff of true cause of his injuries); *Perez*, 167 F.3d at 918-919 (limitations period tolled because of failure by Texas National Guard to provide form to plaintiff advising of the need to file any claim with the federal government, because National Guard was acting in a federal capacity at time of plaintiff's injury); *Glarner*, 30 F.3d at 701-702 (limitations period tolled because of failure by VA to provide proper claims form to plaintiff, which would have cured the deficiency in plaintiff's administrative claim submission); *Stanfill v. United States*, 43 F.Supp.2d 1304, 1309-1310

(Continued on following page)

precluded from granting relief in such cases, on the grounds that § 2401(b) is "jurisdictional" and therefore does not allow the courts to exercise their usual equitable powers, is an important matter that should not be left to the divided opinions of the lower courts but should be resolved by this Court.

CONCLUSION

This Court should grant Marley's petition for a writ of certiorari so that this Court may resolve the division amongst the Circuit Courts of Appeals on the important question of whether 28 U.S.C. § 2401(b) is jurisdictional, and therefore bars federal courts from

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(M.D.Ala. 1999) (limitations period tolled because government first told plaintiff he had to seek relief from the Department of Labor under the Federal Employees Compensation Act, then sought dismissal of subsequent FTCA action for failure to timely comply with FTCA claims submission requirements); *Vinzant v. United States*, 2007 WL 2993857, *2-3 (E.D.La. 2007) (limitations period tolled because U.S. Marshals Service summarily denied claim and directed plaintiff to file suit, then sought dismissal of that action based on a failure to fully comply with administrative claim requirements including the submission of required forms that the Service failed to provide) ("It seems counterintuitive for the government to lure tort claimants toward disadvantage by summarily directing them to federal court, and then oppos[e] federal jurisdiction based on failure to properly present the claims to the agency").

applying equitable limitations in FTCA damage actions.

Respectfully submitted,

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August 31, 2009

567 F.3d 1030

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL BURNELL MARLEY, individually, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 06-36003 D.C. No. CV-06-00366-RSL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
May 8, 2008 – Seattle, Washington

Filed December 8, 2008
Amended June 1, 2009

Before: Susan P. Graber and Johnnie B. Rawlinson, Circuit Judges, and Otis D. Wright II,* District Judge.

Opinion by Judge Graber

---

* The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Michael B. King, Talmadge Law Group PLLC, Tukwila, Washington; and Ann R. Deutscher, Wiener & Lambka, PS, Renton, Washington, for the plaintiff-appellant.

Brian C. Kipnis, Assistant United States Attorney, Seattle, Washington; and Philip H. Lynch and Darwin Roberts, Assistant United States Attorneys, Tacoma, Washington, for the defendant-appellee.

ORDER

The opinion filed December 8, 2008, slip op. at 16067, 548 F.3d 1286, is replaced by the amended opinion filed concurrently with this order. With these amendments, Judges Graber and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Wright has so recommended.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or for rehearing en banc will be entertained.

OPINION

GRABER, Circuit Judge:

We must decide whether the statute of limitations in § 2401(b) of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b), is jurisdictional and, in turn, whether courts can employ the doctrines of equitable estoppel or equitable tolling to extend the limitations period. We hold that the statute of limitations in 28 U.S.C. § 2401(b) is jurisdictional and, consequently, that equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply. Accordingly, we affirm the district court's judgment, which dismissed this action.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Michael Burnell Marley received treatment for prostate cancer at the Puget Sound Healthcare System Hospital. He alleges that he experienced complications resulting in physical injury. In February 2004, he filed an administrative tort claim with the Department of Veterans Affairs.

On October 22, 2004, the Department of Veterans Affairs sent Plaintiff a notice of final denial of his tort claim. The letter, addressed to Plaintiff's lawyer at the time, stated that Plaintiff could file suit against the United States under the FTCA. The notice informed Plaintiff's lawyer that any action "must be initiated within 6 months after the date of the mailing of this notice of final denial as shown by the

date of this letter," that is, within six months of October 22, 2004.

In March 2005, within that six-month period, Plaintiff hired new lawyers and filed a timely complaint for damages against the United States. On December 16, 2005, Plaintiff's new lawyers moved for leave to withdraw from representing Plaintiff. The motion provided no reason for the request.[1] The district court granted the motion on January 3, 2006, and gave Plaintiff "notice that he [was] responsible for pursuing [the] action in accordance with the Order Setting Trial Date and Related Dates."

On January 27, 2006, long after the six-month limitations period had passed, an Assistant United States Attorney ("AUSA") sent a letter to Plaintiff, stating in part:

> I was told by the staff in our Tacoma office that you might be interested in dismissing your case. In case that's still true, I've taken the liberty of drafting a "Stipulation" (enclosed) that would do that. If you're not familiar with the legal terms involved, and in case you don't want to consult another lawyer (which is entirely your right), I'll briefly state my opinion as to what they mean.

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[1] Plaintiff's opening brief asserts that his lawyers withdrew "because they had been unable to locate an expert witness."

> . . . This stipulation provides that your case would be dismissed "without prejudice." That means you could (in theory) bring it again at a later date. The other option would be dismissing "with prejudice," which would mean you could not bring it again. But please be aware that even if you dismiss now "without prejudice," there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again.

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Plaintiff then signed the stipulation and returned it in the self-addressed, stamped envelope that the AUSA had provided. On February 22, 2006, the Stipulation and a Proposed Order dismissing the action were filed with the court. On February 27, 2006, the court dismissed the action "without prejudice."

On March 15, 2006, sixteen days after dismissal of the first action, Plaintiff – once again represented by the lawyers who had filed the first complaint – filed a second action against the United States, which was essentially identical to the first one. The United States filed an answer and a motion to dismiss for failure to meet the six-month deadline prescribed by 28 U.S.C. § 2401(b).

In considering the government's motion, the district court examined documents outside the pleadings and, accordingly, construed the motion as one for summary judgment. According to the court, Plaintiff raised no factual disputes. Turning to the legal issues, the court ruled that Plaintiff could not establish equitable estoppel because he was not ignorant of the six-month time limit and because he could not demonstrate affirmative misconduct by the government. The court rejected Plaintiff's equitable tolling argument on the ground that he was not excusably ignorant of the six-month limitations period.

Plaintiff timely appealed from the resulting judgment, which dismissed the second action as untimely.

DISCUSSION[2]

The FTCA provides that

> every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

28 U.S.C. § 2401(a). The statute goes on to state, as relevant here:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented."

Id. § 2401(b).

Plaintiff filed his first action within six months of the mailing date on the notice of final denial from the Department of Veterans Affairs. But Plaintiff voluntarily dismissed that action. Plaintiff recognizes that, by the time he filed the second action, the six-month period had run. He argues, though, that the January

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27, 2006, letter misled him into thinking that he would be able to file suit on the same claim if the action were dismissed "without prejudice." Thus, he maintains, either equitable estoppel or equitable tolling should save his suit from dismissal.

As a threshold matter, we must decide whether we have jurisdiction over a claim that does not meet the deadlines contained in § 2401(b). *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (stating that a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction). We conclude that we do not have jurisdiction and, therefore, cannot apply the doctrines of equitable estoppel or equitable tolling that might otherwise allow Plaintiff's case to proceed.

Unless Congress enacts legislation that subjects the federal government to tort liability, the United States, as sovereign, cannot be sued. *United States v. Dalm*, 494 U.S. 596, 610 (1990); *Minnesota v. United States*, 305 U.S. 382, 388 (1939). The FTCA is a limited waiver of the federal government's historical immunity from tort liability. *Molzof v. United States*, 502 U.S. 301, 305 (1992); *United States v. Orleans*, 425 U.S. 807, 813 (1976).

[1] The FTCA's statute of limitations is a condition of the federal government's waiver of sovereign immunity. *See United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("[T]he [FTCA] waives the immunity of the United States and . . . in construing the statute of

limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."). "[W]hen Congress attaches conditions to legislation waiving sovereign immunity of the United States, those conditions must be 'strictly observed.'" *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 287 (1983). Meeting the statutory deadlines, then, is generally a condition upon which the ability to sue the federal government is predicated.

[2] In certain circumstances, however, a late filing may not be fatal, as a court may employ equitable doctrines to excuse a claimant's tardiness. The Supreme Court recognized in *John R. Sand & Gravel Co. v. United States,* 128 S. Ct. 750, 753 (2008), that equitable doctrines are available to extend statutes of limitations in many cases. "Most statutes of limitations," the Court explained, "seek primarily to protect defendants against stale or unduly delayed claims." *Id.* When considering that kind of statute, courts have flexibility to toll the limitations period "in light of special equitable considerations." *Id.*

[3] In other cases, time limits are "more absolute." *Id.* If a statute of limitations aims "not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency," a court's flexibility in using equitable doctrines to

extend deadlines is limited. *Id.* (citations omitted). When construing a statute containing a strict limitations period, the Court has "often read the time limits . . . as more absolute, say as . . . forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* These statutes of limitations have been referred to, in "shorthand," as "jurisdictional." *Id.*

Resolution of the present case, then, depends on how to categorize the six-month filing deadline of § 2401(b). If the time limit is "jurisdictional," we can apply neither equitable estoppel nor equitable tolling to save Plaintiff's case. *Id.* If the time limit is instead intended to be only a procedural bar, equitable doctrines may apply. *Id.*

John R. Sand & Gravel itself is instructive. In that case, the Supreme Court was considering the statute of limitations in 28 U.S.C. § 2501, which states:

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[4] We, too, can find the answer in our own precedent. We have long held that § 2401(b) is jurisdictional.[3] *See, e.g., Berti v. V.A. Hospital,* 860 F.2d 338, 340 (9th Cir. 1988). There, we held that the timing requirement contained in § 2401(b) is jurisdictional and is "subject neither to estoppel principles nor to equitable considerations." *Id.* We rejected the plaintiff's claim as untimely and, because neither estoppel nor equitable tolling could extend the limitations period, the plaintiff's claim could not succeed. *Id.; see also Augustine v. United States,* 704 F.2d

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[3] We recognize that *Cedars-Sinai Medical Center v. Shalala,* 125 F.3d 765, 770 (9th Cir. 1997), held that the six-year statute of limitations in § 2401(a) is not "jurisdictional," but instead sets up a waivable procedural bar. Section 2401(a) is not before us, so we need not decide here whether *Cedars-Sinai* can survive after *John R. Sand & Gravel.*

1074, 1077 (9th Cir. 1983) ("Timely compliance with section 2401(b) is a jurisdictional prerequisite to maintenance of a FTCA suit."); *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (per curiam) (noting that the requirements of § 2401(b), and 28 U.S.C. § 2675(a), another FTCA statute of limitations, are "jurisdictional in nature and may not be waived"); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968) (holding that the statute of limitations in § 2401(b) is jurisdictional and that the time limitation was not tolled while the claimant was a minor).

Berti in turn cited *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985), which held that § 2675(a) was jurisdictional. There, the plaintiff had filed an untimely action, but he argued that the United States should be estopped from asserting the insufficiency of his administrative claim and that principles of equity should toll the statute of limitations. *Burns*, 764 F.2d at 724. We held that § 2675(a) is jurisdictional and that the government could not be barred, through the operation of equitable doctrines, from asserting that jurisdictional requirements must be met. *Id.*; *see also William G. Tadlock Constr. v. U.S. Dep't of Defense*, 91 F.3d 1335, 1340 (9th Cir. 1996) (recognizing that, if a filing period is jurisdictional, equitable doctrines are inapplicable because their use would create jurisdiction in the federal courts where Congress has not done so).

Our more recent cases also reflect the view that the timing requirements of § 2401(b) are jurisdictional. *See, e.g., Goodman v. United States*, 298 F.3d

1048, 1053 (9th Cir. 2002) ("A district court does not have jurisdiction to hear a tort claim against the United States unless the claimant files a complaint in federal court within six months after final agency decision."); *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.) (holding that the two-year limitation in § 2401(b) is a "threshold jurisdictional requirement"), *amended on denial of reh'g*, 298 F.3d 754 (9th Cir. 2002). Just as the Supreme Court in *John R. Sand & Gravel* relied on its past cases to conclude that the statute of limitations at issue there was jurisdictional and not subject to equitable extensions so, too, we are bound by our own precedents to hold that the limitations period in § 2401(b) is jurisdictional.

[5] Even in the absence of those Ninth Circuit precedents, we would reach the same conclusion. The purpose of § 2401(b)'s six-month filing deadline fits squarely into *John R. Sand & Gravel*'s second category of statutes of limitations: Its purpose is "not so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims." *John R. Sand & Gravel*, 128 S. Ct. at 753. The FTCA includes a detailed administrative process for handling tort claims against agencies. The statutory filing deadline is a key part of that process and plainly "facilitat[es] the administration of claims." When the six-month deadline to file an action in federal court was added to the FTCA in 1966, the

Senate Judiciary Committee concluded that the deadline would

> ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. . . . The committee observes that the improvements contemplated by the bill would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself.

S. Rep. No. 89-1327 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2516. Those remarks bolster our conclusion that the purpose of the six-month limitation was, indeed, to facilitate the administration of claims. Additionally, the legislative history of § 2401(b) of the FTCA suggests that Congress did not intend for equitable tolling to apply. *See generally* Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective,* 31 Seton Hall L. Rev. 174 (2000) (engaging in a detailed discussion of the legislative history of § 2401).

[6] A final reason to conclude that equitable exceptions do not apply to § 2401(b) is found in its context. Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b). Section 2401(a) of the statute reads in part: "The action of any person under legal disability or beyond the seas at the time the claim

accrues may be commenced within three years after the disability ceases." Section 2401(b) contains no exceptions to its six-month statute of limitations. Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Because Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include *any* exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly. If Congress had intended to grant exceptions to the § 2401(b) limitations period, it would have done so expressly, as it did in § 2401(a). *United States v. Fiorillo,* 186 F.3d 1136, 1153 (9th Cir. 1999) (per curiam).

[7] To summarize, because § 2401(b) is jurisdictional, we must refrain from using equitable estoppel or equitable tolling to excuse Plaintiff's untimeliness. To save Plaintiff's suit using an equitable doctrine would impinge on Congress' role as regulator of the jurisdiction of the federal courts.

[8] We are mindful that a panel decision of our court held that § 2401(b) is not jurisdictional but, for reasons we shall explain, that holding has no precedential value. In *Alvarez-Machain v. United States,* 107 F.3d 696, 700 (9th Cir. 1996), the plaintiff filed suit under the FTCA one year after the deadline

embodied in § 2401(b) had lapsed. The plaintiff had been abducted by federal agents, interrogated in Mexico and, upon his return, incarcerated for more than two years before being acquitted at trial. *Id.* at 699. He argued that his late filing should be excused under the doctrine of equitable tolling. *Id.* at 700. We held, with respect to § 2401(b): "Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances. . . ." *Id.* at 701 (citations omitted).

After the panel's decision issued, our court voted to rehear the case en banc. *See Alvarez-Machain v. United States*, 284 F.3d 1039 (9th Cir. 2002) (order). The order granting rehearing en banc stated: "The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court." *Id.* at 1040. The panel's holding regarding § 2401(b) therefore lost its precedential value, except to the extent that the en banc court later adopted it.

The en banc opinion did not discuss the FTCA statute of limitations; our FTCA discussion was limited to whether two statutory exceptions, the "foreign activities" exception and the "intentional tort" exception, applied. *See Alvarez-Machain v. United States*, 331 F.3d 604, 638-40 (9th Cir. 2003) (en banc). The en banc court adopted no part of the

panel opinion. But, to reach the merits of the plaintiff's FTCA claims, we had to have held implicitly that the statute of limitations was tolled, because the plaintiff's suit was filed well after the deadline had passed. We therefore implicitly held that § 2401(b) is non-jurisdictional; sitting as an en banc court, we could do so despite our earlier panel decisions to the contrary.

[9] But the story does not end there. In time, the Supreme Court granted certiorari and reversed our en banc decision. *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 738 (2004). Just as we had done, the Court moved directly to the merits of the FTCA claim without examining jurisdiction; that is, it did not discuss whether tolling was available under § 2401(b). *Id.* at 700-03. After the Supreme Court's decision, our en banc court *vacated* its earlier opinion and remanded the case to the district court for further proceedings. *Alvarez-Machain v. United States,* 374 F.3d 1384 (9th Cir. 2004) (en banc order). Because "a decision that has been vacated has no precedential authority whatsoever," *Durning v. Citibank, N.A.,* 950 F.2d 1419, 1424 n.2 (9th Cir. 1991), our implicit en banc holding regarding § 2401(b) is of no moment and does not bind us. *See also* 47 Am. Jur. 2d *Judgments* § 714 (2009) ("When a judgment has been rendered and later set aside or vacated, the matter stands precisely as if there had been no judgment."). Nor are we bound by the Supreme Court's *sub silentio* assumption that it had jurisdiction over Alvarez-Machain's FTCA claims in *Sosa*. *See*

Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir. 1998) (holding that, when the Supreme Court did not address a jurisdictional issue directly in a previous case, its *sub silentio* assumption that it had jurisdiction "does not constitute binding authority" on that jurisdictional issue). Similarly, our own *sub silentio* assumption that we had jurisdiction over late-filed claims in three post-*Alvarez-Machain* cases does not create an intra-circuit conflict on this issue, because our assumption of jurisdiction in those cases does not dictate that we have jurisdiction in this case. *See Hensley v. United States*, 531 F.3d 1052, 1057-58 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3437 (U.S. Jan. 14, 2009) (No. 03-904); *Papa v. United States*, 281 F.3d 1004, 1011 (9th Cir. 2002); *Lehman v. United States*, 154 F.3d 1010, 1015-16 (9th Cir. 1998).

[10] In summary, we hold that the six-month statute of limitations in § 2401(b) is jurisdictional and that failure to file a claim within that time period deprives the federal courts of jurisdiction. Accordingly, the doctrines of equitable estoppel and equitable tolling do not apply. We dismiss Plaintiff's claim for lack of subject matter jurisdiction.

AFFIRMED.

548 F.3d 1286

United States Court of Appeals,
Ninth Circuit.
Michael Burnell MARLEY, individually,
Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.
No. 06-36003.

Argued and Submitted May 8, 2008.
Filed Dec. 8, 2008.

Michael B. King, Talmadge Law Group PLLC, Tukwila, WA; and Ann R. Deutscher, Wiener & Lambka, PS, Renton, WA, for the plaintiff-appellant.

Brian C. Kipnis, Assistant United States Attorney, Seattle, WA; and Philip H. Lynch and Darwin Roberts, Assistant United States Attorneys, Tacoma, WA, for the defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; Robert S. Lasnik, District Judge, Presiding. D.C. No. CV-06-00366-RSL.

Before: SUSAN P. GRABER and JOHNNIE B. RAWLINSON, Circuit Judges, and OTIS D. WRIGHT II,* District Judge.

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* The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

GRABER, Circuit Judge:

We must decide whether the statute of limitations in § 2401(b) of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b), is jurisdictional and, in turn, whether courts can employ the doctrines of equitable estoppel or equitable tolling to extend the limitations period. We hold that the statute of limitations in 28 U.S.C. § 2401(b) is jurisdictional and, consequently, that equitable doctrines that otherwise could excuse a claimant's untimely filing do not apply. Accordingly, we affirm the district court's judgment, which dismissed this action.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Michael Burnell Marley received treatment for prostate cancer at the Puget Sound Healthcare System Hospital. He alleges that he experienced complications resulting in physical injury. In February 2004, he filed an administrative tort claim with the Department of Veterans Affairs.

On October 22, 2004, the Department of Veterans Affairs sent Plaintiff a notice of final denial of his tort claim. The letter, addressed to Plaintiff's lawyer at the time, stated that Plaintiff could file suit against the United States under the FTCA. The notice informed Plaintiff's lawyer that any action "must be initiated within 6 months after the date of the mailing of this notice of final denial as shown by the date of this letter," that is, within six months of October 22, 2004.

In March 2005, within that six-month period, Plaintiff hired new lawyers and filed a timely complaint for damages against the United States. On December 16, 2005, Plaintiff's new lawyers moved for leave to withdraw from representing Plaintiff. The motion provided no reason for the request.[1] The district court granted the motion on January 3, 2006, and gave Plaintiff "notice that he [was] responsible for pursuing [the] action in accordance with the Order Setting Trial Date and Related Dates."

On January 27, 2006, long after the six-month limitations period had passed, an Assistant United States Attorney ("AUSA") sent a letter to Plaintiff, stating in part:

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The Court held that § 2501 is jurisdictional and therefore absolute in nature. 128 S.Ct. at 754. Using the principle of stare decisis, the Court relied on past cases in which it had held that the statute was not one that could be equitably tolled. *Id.* The Court

rejected the plaintiff's assertion that *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), which established a rebuttable presumption that equitable tolling is available in suits against the government, applied when the Court's past cases already had established a rule dealing with the particular statute at hand. *John R. Sand & Gravel*, 128 S.Ct. at 755-56.

We, too, can find the answer in our own precedent. We have long held that § 2401(b) is jurisdictional.[3] *See, e.g., Berti v. V.A. Hospital*, 860 F.2d 338, 340 (9th Cir.1988). There, we held that the timing requirement contained in § 2401(b) is jurisdictional and is "subject neither to estoppel principles nor to equitable considerations." *Id.* We rejected the plaintiff's claim as untimely, and because neither estoppel nor equitable tolling could extend the limitations period, the plaintiff's claim could not succeed. *Id.*; *see also Mann v. United States*, 399 F.2d 672, 673 (9th Cir.1968) (holding that the statute of limitations in § 2401(b) is jurisdictional and that the time limitation was not tolled while the claimant was a minor).

Berti in turn cited *Burns v. United States*, 764 F.2d 722, 724 (9th Cir.1985), which held that another

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[3] We recognize that *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir.1997), held that the six-year statute of limitations in § 2401(a) is not "jurisdictional," but instead sets up a waivable procedural bar. Section 2401(a) is not before us, so we need not decide here whether *Cedars-Sinai* can survive after *John R. Sand & Gravel*.

FTCA statute of limitations, 28 U.S.C. § 2675(a), was jurisdictional. There, the plaintiff had filed an untimely action, but he argued that the United States should be estopped from asserting the insufficiency of his administrative claim and that principles of equity should toll the statute of limitations. *Burns*, 764 F.2d at 724. We held that § 2675(a) is jurisdictional and that the government could not be barred, through the operation of equitable doctrines, from asserting that jurisdictional requirements must be met. *Id.*; *see also William G. Tadlock Constr. v. U.S. Dep't of Defense*, 91 F.3d 1335, 1340 (9th Cir.1996) (recognizing that, if a filing period is jurisdictional, equitable doctrines are inapplicable because their use would create jurisdiction in the federal courts where Congress has not done so).

Our more recent cases also reflect the view that the timing requirements of § 2401(b) are jurisdictional. *See, e.g., Goodman v. United States*, 298 F.3d 1048, 1053 (9th Cir.2002) ("A district court does not have jurisdiction to hear a tort claim against the United States unless the claimant files a complaint in federal court within six months after final agency decision."); *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.) (holding that the two-year limitation in § 2401(b) is a "threshold jurisdictional requirement"), *amended on denial of reh'g*, 298 F.3d 754 (9th Cir.2002). Just as the Supreme Court in *John R. Sand & Gravel* relied on its past cases to conclude that the statute of limitations at issue there was jurisdictional and not subject to equitable extensions

so, too, we are bound by our own precedents to hold that the limitations period in § 2401(b) is jurisdictional.

Even in the absence of those Ninth Circuit precedents, we would reach the same conclusion. The purpose of § 2401(b)'s six-month filing deadline fits squarely into *John R. Sand & Gravel*'s second category of statutes of limitations: Its purpose is "not so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims." *John R. Sand & Gravel,* 128 S.Ct. at 753. The FTCA includes a detailed administrative process for handling tort claims against agencies. The statutory filing deadline is a key part of that process and plainly "facilitat[es] the administration of claims." When the six-month deadline to file an action in federal court was added to the FTCA in 1966, the Senate Judiciary Committee concluded that the deadline would

> ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. . . . The committee observes that the improvements contemplated by the bill would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself.

S.Rep. No. 89-1327 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2516. Those remarks bolster our conclusion that the purpose of the six-month limitation was, indeed, to facilitate the administration of claims. Additionally, the legislative history of § 2401(b) of the FTCA suggests that Congress did not intend for equitable tolling to apply. *See generally* Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L.Rev. 174 (2000) (engaging in a detailed discussion of the legislative history of § 2401).

A final reason to conclude that equitable exceptions do not apply to § 2401(b) is found in its context. Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b). Section 2401(a) of the statute reads in part: "The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." Section 2401(b) contains no exceptions to its six-month statute of limitations. Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted). Because Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include *any*

exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly. If Congress had intended to grant exceptions to the § 2401(b) limitations period, it would have done so expressly, as it did in § 2401(a). *United States v. Fiorillo,* 186 F.3d 1136, 1153 (9th Cir.1999) (per curiam).

To summarize, because § 2401(b) is jurisdictional, we must refrain from using equitable estoppel or equitable tolling to excuse Plaintiff's untimeliness. *Tadlock,* 91 F.3d at 1340. To save Plaintiff's suit using an equitable doctrine would impinge on Congress' role as regulator of the jurisdiction of the federal courts. *Id.*

We are mindful that one Ninth Circuit case held that § 2401(b) is not jurisdictional, but we must overrule it, in light of our prior contrary precedents and the Supreme Court's subsequent holding in *John R. Sand & Gravel. See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc) (holding that when the Supreme Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," a three-judge panel of this court should consider itself bound by the intervening higher authority and reject the prior opinion of the court as having been effectively overruled). In *Alvarez-Machain v. United States,* we held, with respect to § 2401(b): "Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. Nothing in the FTCA indicates that Congress intended for

equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances. . . ." 107 F.3d 696, 701 (9th Cir.1996) (citations omitted). *Alvarez-Machain*'s cursory analysis contains two errors that lead us to overrule it.[4]

First, the principle of stare decisis required *Alvarez-Machain* to follow our earlier decisions in *Berti* and *Mann,* which held that § 2401(b) is jurisdictional and equitable doctrines do not apply. The three-judge panel in *Alvarez-Machain* was not free to overrule those cases. *See Bowe v. INS,* 597 F.2d 1158, 1159 n. 1 (9th Cir.1979) (noting that a three-judge panel is "obligated to follow the prior holdings of this court and is not free to overrule earlier holdings even if [it] consider[s] them ill-advised").

Second, and perhaps more important, *Alvarez-Machain,* 107 F.3d at 701, relied on the *Irwin* analysis that the Supreme Court rejected in *John R. Sand & Gravel. John R. Sand & Gravel* states that the rebuttable presumption of *Irwin* is not the correct rule when, as here, past precedents analyzing the specific statute at issue are available. *See John R. Sand & Gravel,* 128 S.Ct. at 755-56 (noting that *Irwin,* which announced a "general prospective rule," did not control when the Court had "previously

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[4] We also disagree with the conclusion in *Alvarez-Machain* that nothing in the legislative history of § 2401(b) suggests that equitable tolling should not apply because, as the discussion above demonstrates, it appears that Congress in fact did not intend for equitable tolling to apply to this section.

provided a definitive interpretation" of the statute at issue). *Alvarez-Machain,* which is an aberration in our jurisprudence on the § 2401(b) statute of limitations, is "clearly irreconcilable" with *John R. Sand & Gravel,* because it relied on *Irwin* when our prior cases already had determined that § 2401(b) is jurisdictional. Because the Supreme Court has undercut the theory and reasoning underlying *Alvarez-Machain,* we must view it as having been effectively overruled by *John R. Sand & Gravel. Miller,* 355 F.3d at 900.

In conclusion, we must dismiss Plaintiff's claim for lack of subject matter jurisdiction. The doctrines of equitable estoppel and equitable tolling do not apply.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BURNELL MARLEY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. C06-0366RSL ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss filed by the United States (Dkt. #18) for lack of subject matter jurisdiction. Plaintiff alleges medical negligence by healthcare providers employed by the Department of Veterans Affairs ("VA"). The United States argues that plaintiff failed to file this lawsuit within the time period required by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b).

For the reasons set forth below, the Court grants the motion.

II. DISCUSSION

A. Background Facts.

Plaintiff Michael Marley was an active member of the Unites [sic] States Armed Forces and was therefore entitled to receive medical care at VA

medical facilities. Plaintiff received treatment for prostate cancer at The Puget Sound Healthcare System Hospital ("VHS") in Seattle beginning in March 2001. Shortly thereafter, he underwent brachytherapy at the VHS. Plaintiff alleges that he experienced serious complications from the procedure, and as a result, he suffers from permanent disability, disfigurement, and extreme pain.

Plaintiff filed an administrative claim with the VA in February 2004. The claim was formally denied on October 22, 2004.

Plaintiff filed a lawsuit in this district on March 3, 2005. *Michael B. Marley v. United States,* C05-348RSM (W.D. Wash. 2005) ("Marley I"). On January 3, 2006, the court granted plaintiff's counsel's motion to withdraw and advised plaintiff that he would be responsible for pursuing his action unless and until new counsel entered an appearance. The government's attorney sent plaintiff a letter, dated January 27, 2006, stating, "I was told by the staff in our Tacoma office that you might be interested in dismissing your case." Exhibit to Plaintiff's Amended Response. The letter included a stipulation of dismissal without prejudice. The government's attorney sent plaintiff a second letter dated February 14, 2006 following up on the earlier letter and noting that deadlines in the case were approaching, including an April 10, 2006 deadline to disclose expert witnesses. The February letter stated, "If you intend to keep litigating your case, I would appreciate it if you could please let me know, so that I can work on it and meet

my side of the deadlines." *Id.* On February 22, 2006, plaintiff and the United States filed a stipulation to dismiss. The court approved the stipulation and dismissed Marley I without prejudice on February 27, 2006.

Plaintiff filed his complaint in this case on March 15, 2006. The complaint is based on the same administrative claim as Marley I.

B. Applicable Standards.

The relevant statutory provision provides, "A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). As an initial matter, the government has filed its motion under Rule 12(b)(1), arguing that the FTCA's time limits are jurisdictional. However, recent cases have explained that "'federal statutory time limitations on suits against the government are not jurisdictional in nature.'" *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997) (analyzing 28 U.S.C. § 2401(a)) (quoting *Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir. 1994) and citing *Irwin v. Department of Veterans Affs.*, 498 U.S. 89 (1990)). Although some requirements for suing the government are jurisdictional, a statute of limitations that "does not speak of jurisdiction, but erects only a procedural bar" is not jurisdictional. *Cedars-Sinai*

Med. Ctr., 125 F.3d at 770 (citing *Irwin*, 498 U.S. at 95) (additional citations omitted). Section 2401(b) speaks only of time limitations, and therefore does not erect a jurisdictional bar. Accordingly, this motion is more appropriately considered as one to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, e.g., Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (explaining that the government's motion to dismiss for failure to comply with a statute of limitations in an IRS statute should have been filed as a Rule 12(b)(6) motion rather than a Rule 12(b)(1) motion). Because both parties filed documents outside the pleadings, and the Court has considered those filings, the Court construes this motion as one for summary judgment.

On a motion for summary judgment, the Court must "view the evidence in the light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact." *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences supported by the evidence are to be drawn in favor of the nonmoving party. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving party, summary judgment must be denied." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In this case, plaintiff has not identified any facts in dispute. Instead, his memorandum focuses on the legal import of those facts.

C. Analysis.

Plaintiff does not dispute the applicability of the six-month statute of limitations or that he filed this lawsuit after it expired. Instead, he argues that he should be allowed to pursue this lawsuit under the doctrines of equitable estoppel or equitable tolling.

1. Equitable Estoppel.

Equitable estoppel includes four elements:

> (1) The party to be estopped must know the fact; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Watkins v. Unites [sic] *States Army*, 875 F.2d 699, 709 (9th Cir. 1989) (internal citations and quotation omitted). Two additional factors must apply before the government will be estopped. Specifically, "'[a] party seeking to raise estoppel against the government must establish 'affirmative conduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.'" *Id.* at 707 (quoting *Wagner v. Dir., FEMA*, 847 F.2d 515, 519 (9th Cir. 1988) (quoting *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985))). "There is no single test for determining the presence of affirmative

misconduct; each case must be decided on its own particular facts and circumstances." *Id.* It does not require an affirmative misrepresentation, affirmative concealment of a material fact by the government, or government intent to mislead a party. *Id.* (finding misconduct where the military repeatedly and affirmatively misrepresented to a service member that he was qualified for reenlistment even though he was not, eventually leading to the loss of his distinguished military career).

In this case, plaintiff cannot meet the third element of the test because he was not ignorant of the relevant facts. The VA's letter denying his claim explicitly informed him that a lawsuit "must be initiated within 6 months" after the letter was mailed. Motion to Dismiss, Ex. A. Although plaintiff states in his declaration that he did not recall having "knowledge or possession" of the letter, the letter was sent to his attorney, and notice to his counsel constitutes notice to him. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 397 (1993) (explaining that a client is "considered to have notice of all facts, notice of which can be charged upon the attorney") (internal citation and quotation omitted); *see also Jones v. Stevedoring Co. v. Dir., OWCP,* 133 F.3d 683, 689 (9th Cir. 1997) (imputation of knowledge from attorney to client is "bedrock" principle of representative litigation).

In addition to plaintiff's imputed knowledge of the facts, equitable estoppel is unwarranted because the government did not engage in affirmative

misconduct. The facts do not support plaintiff's implication that the government took advantage of him. Notably, the correspondence indicates that *plaintiff* initiated discussions about dismissing his case. As plaintiff readily admits, he sought the dismissal to obtain additional time to retain an expert. Although plaintiff alleges that he was on narcotic pain medication at the time, there is nothing in the record to indicate that the government's counsel was aware of that or that plaintiff was incapable of representing himself.

Plaintiff also argues that he was "actively mislead" because the government's January 27, 2006 letter stated that the dismissal would be without prejudice, but in fact his claim is now time barred. Although the ultimate effect of the dismissal might be the same as a dismissal with prejudice, Marley I was dismissed without prejudice. Plaintiff further argues that the government misled him by writing that the dismissal without prejudice meant that he "could (in theory) bring [a lawsuit] again at a later date." He alleges that the statement was misleading because "there is no theory by which suit could ever be filed again." Plaintiff's Response at p. 7. In fact, plaintiff has refiled his suit, and is currently asserting that it can proceed under two theories.

In a factually similar case, the court upheld the dismissal of plaintiff's claim because she initially filed it in a timely manner, then agreed to dismiss it, then refiled it after the statute of limitations had run. *Lehman v. United States*, 154 F.3d 1010, 1017 (9th

Cir. 1998). The court declined to apply equitable estoppel, even though the government's attorney had not informed plaintiff of the statute of limitations and represented to her that the action "would be voluntarily dismissed until Ms. Lehman's medical condition had stabilized, at which point settlement negotiations would resume." *Id.* at 1012. Plaintiff argues that *Lehman* is distinguishable because the statute of limitations had not yet run when Ms. Lehman executed the stipulation and she was represented by counsel at that time. Neither factor alters the result here. There was nothing inappropriate about the government's counsel writing to plaintiff to follow up on his expressed interest in dismissing his lawsuit, and defendant was not obligated to advise him of the statute of limitations. *Id.* at 1017 (explaining that "an omission to give advice is insufficient conduct to support equitable estoppel against the government") (internal citation omitted). Nevertheless, the January 2006 letter stated, "please be aware that even if you dismiss now 'without prejudice,' there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again." Exhibit to Plaintiff's Amended Response. Under these facts, the government did not misrepresent facts, mislead plaintiff, or engage in affirmative misconduct. Equitable estoppel is not warranted.

2. Equitable Tolling.

While equitable estoppel focuses on the nature of defendant's conduct, equitable tolling focuses "*on the plaintiff's* excusable ignorance of the limitations period." *Lehman,* 154 F.3d at 1016 (emphasis in original). As the Supreme Court has explained, the doctrine has been applied "only sparingly" in "situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin,* 498 U.S. at 96 (declining to apply equitable tolling where plaintiff missed the filing deadline because his attorney was out of the office when the agency's notice was sent; explaining that equitable tolling does not apply to "garden variety" excusable neglect).

Certainly, the fact that plaintiff was proceeding *pro se* at the time he sought to dismiss Marley I weighs in favor of applying equitable tolling, although it is not dispositive. *See, e.g., Washington,* 10 F.3d at 1437 (dismissing time barred claims despite plaintiff's *pro se* status). Plaintiff could have sought legal advice about the effect of the dismissal, but apparently chose not to do so. The Court also considers the lack of government misconduct and plaintiff's presumed knowledge of the six-month limitations period, which weigh against equitable tolling. Furthermore, plaintiff did not file a defective pleading during the statutory period. Instead, he voluntarily dismissed his timely pleading for strategic

reasons, to gain additional time to locate an expert. If equitable tolling "is not available to avoid the consequences of one's own negligence," *Lehman*, 154 F.3d at 1016, it follows that it should not be available to avoid the consequences of one's own strategic decisions, even if they are misguided.

Unfortunately for plaintiff, the result of failing to apply an equitable remedy is harsh. Because plaintiff has filed this lawsuit outside the limitations period, it is barred as untimely. However, waivers of the government's sovereign immunity are strictly construed. *See, e.g., Irwin*, 498 U.S. at 94. In addition, the inability to pursue otherwise valid claims is the "very purpose" of statutes of limitations. *United States v. Kubrick*, 444 U.S. 111, 125 (1979) (finding that plaintiff's FTCA claim was barred by the statute of limitations).

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS defendant's motion to Dismiss. (Dkt. #18). The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiff.

DATED this 2nd day of November, 2006.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

United States District Court
WESTERN DISTRICT OF WASHINGTON

MICHAEL BURNELL MARLEY	JUDGMENT IN A CIVIL CASE
v.	CASE NUMBER:
UNITED STATES OF AMERICA	C06-366RSL

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of defendant and against plaintiff.

November 2, 2006

BRUCE RIFKIN
Clerk

s/ Rhonda Stiles
By, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BURNELL MARLEY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. C06-0366RSL ORDER GRANTING MOTION FOR PARTIAL RECONSIDERATION

This matter comes before the Court on the United States' motion for partial reconsideration of the Court's November 2, 2006 order granting its motion to dismiss (Dkt. #24, the "Order"). The United States contends that the Court properly dismissed plaintiff's case but erroneously noted that the time limit contained in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b) is not jurisdictional. The United States argues that the finding was not necessary to the decision. Plaintiff filed a response to the motion, arguing that the Court did not err.

The applicable portion of the Order stated:

> The relevant statutory provision provides, "A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

> As an initial matter, the government has filed its motion under Rule 12(b)(1), arguing that the FTCA's time limits are jurisdictional. However, recent cases have explained that "'federal statutory time limitations on suits against the government are not jurisdictional in nature.'" *Cedars-Sinai Med. Ctr. v. Shalala,* 125 F.3d 765, 770 (9th Cir. 1997) (analyzing 28 U.S.C. § 2401(a)) (quoting *Washington v. Garrett,* 10 F.3d 1421, 1437 (9th Cir. 1994) and citing *Irwin v. Department of Veterans Affs.,* 498 U.S. 89 (1990)). Although some requirements for suing the government are jurisdictional, a statute of limitations that "does not speak of jurisdiction, but erects only a procedural bar" is not jurisdictional. *Cedars-Sinai Med. Ctr.,* 125 F.3d at 770 (citing *Irwin,* 498 U.S. at 95) (additional citations omitted). Section 2401(b) speaks only of time limitations, and therefore does not erect a jurisdictional bar. Accordingly, this motion is more appropriately considered as one to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, e.g., Supermail Cargo, Inc. v. United States,* 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (explaining that the government's motion to dismiss for failure to comply with a statute of limitations in an IRS statute should have been filed as a Rule 12(b)(6) motion rather than a Rule 12(b)(1) motion).

Order at p. 3. Based on the cited and other relevant authority, the Court does not believe that it erred in concluding that Section 2401(b) does not erect a

jurisdictional bar. However, the United States correctly notes that the Ninth Circuit has not specifically ruled on the issue. Furthermore, resolution of whether the time limit in Section 2401(b) is jurisdictional is not necessary to the holding in the Order. Regardless of whether the motion is construed as a Rule 12(b)(1) motion to dismiss for lack of jurisdiction or a Rule 12(b)(6) motion, the outcome is the same.

Accordingly, the United States' motion for partial reconsideration (Dkt. #26) is GRANTED. The Court vacates the Order's finding that Section 2401(b) does not erect a jurisdictional bar.

DATED this 29th day of November, 2006.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON,
AT SEATTLE

MICHAEL BURNELL MARLEY, individually, Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.	NO. CV06-0366RSL DECLARATION OF MICHAEL BURNELL MARLEY (Filed Sept. 28, 2006)

I, MICHAEL BURNELL MARLEY, make this declaration based on personal knowledge.

In February, 2006, I received from the United States Attorney's Office, a Stipulated Dismissal of Action pleading in my case, *Michael Burnell Marley v. The United States of America,* NO. C05-0348-RSM.

At the time I received the Stipulation I did not have legal counsel and the United States Attorney's Office knew I did not have legal counsel. Also at that time I was taking narcotics for pain management. I was taking eight percocet tablets a day as well as either morphine or oxycodone. I am in a routine where I take morphine for two weeks at a dosage of 3 x 60mg tablets per day and then I switch to oxycodone for two weeks at a dosage of 3 x 40mg tablets per day. I was on this pain management routine in February, 2006.

I understood that I could sign the enclosed stipulation to dismiss and file my claim again at a later date: the stipulation stated that the action shall be dismissed ***without prejudice***. I understood this language to mean that I could sign the stipulation to dismiss and re-file at a later date.

I signed the Stipulated Dismissal of Action and returned it in the self-addressed stamped envelope provided to me by the United States Attorney's Office. My claim was re-filed on March 15, 2006, sixteen days after the first claim was dismissed without prejudice.

I do not recall having knowledge or possession of the letter from the Department of Veterans Affairs addressed to Andrea A. Darvas my first attorney, denying my claim and setting forth the six-month expiration of my claim. At the time I signed the Stipulation to Dismiss I understood that I could re-file and I had no knowledge of any reason my claim would be barred if I were to dismiss it and re-file at a later date. If I had known that I would be barred from re-filing my claim I would never had dismissed this case.

I have a twelfth grade education level and I lack knowledge of the legal system.

I declare under penalty of perjury, pursuant to the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 28 day of Sept., 2006.

/s/ Michael Burnell Marley
Michael Burnell Marley

U.S. Department of Justice

[SEAL] *United States Attorney*
Western District of Washington

Please reply to:
Darwin P. Roberts
Assistant United States Attorney
Direct Line: (206) 553-4325

700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Tel: (206) 553-7970
Fax: (206) 553-4067
www.usdoj.gov/usao/waw

January 27, 2006

Mr. Michael Burnell Marley
P.O. Box 82288
Fairbanks, AK 99708

Via U.S. Mail

Re: Marley v. United States
No. 05-348 RSM, USDC, W.D. Washington

Dear Mr. Marley:

My name is Darwin Roberts, and I'm the Assistant U.S. Attorney who is currently representing the United States in your case. I understand that your previous attorney, Ms. Deutscher, is no longer representing you, so I'm writing to you personally.

I was told by the staff in our Tacoma office that you might be interested in dismissing your case. In case that's still true, I've taken the liberty of drafting a "Stipulation" (enclosed) that would do that. If you're not familiar with the legal terms involved, and in case you don't want to consult another lawyer (which

is entirely your right), I'll briefly state my opinion as to what they mean.

Federal Rule of Civil Procedure 41 is the rule that allows the parties to a case to agree that it should be dismissed instead of going forward. This stipulation provides that your case would be dismissed "without prejudice." That means you could (in theory) bring it again at a later date. The other option would be dismissing "with prejudice," which would mean you could not bring it again. But please be aware that even if you dismiss now "without prejudice," there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again. Finally, the dismissal "without costs to either party" simply means neither party owes the other any money for court costs.

If you have any questions about this, please feel free to call me at the number listed above. If those conditions are all right with you, and you do want to dismiss your case, you can date and sign the Stipulation as indicated by the sticky notes and mail it back to me in the enclosed envelope. My signature is already on it. When I get it back, I will file it with the court and send you a copy.

I look forward to hearing from you.

Sincerely,

JOHN McKAY
United States Attorney

Darwin P. Roberts
Assistant United States Attorney

Enclosure

U.S. Department of Justice

[SEAL] *United States Attorney*
Western District of Washington

Please reply to:
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February 14, 2006

Mr. Michael Burnell Marley
P.O. Box 82288
Fairbanks, AK 99708

Via U.S. Mail

Re: Marley v. United States
No. 05-348 RSM, USDC, W.D. Washington

Dear Mr. Marley:

A few weeks ago, I mailed you a letter asking whether you wanted to voluntarily dismiss your case. It included a pleading for your signature. If you didn't receive that letter, please let me know at your earliest convenience and I'll send you another copy.

I have not heard from you since I sent that letter. I'm writing again because there are deadlines approaching in your case. For example, expert reports are due to be disclosed by April 10, 2006. If you intend to keep litigating your case, I would appreciate it if you could please let me know, so that I can work on it and meet my side of the deadlines. But if you do

want to dismiss it, please send me the stipulation and I will go ahead and file it for you.

Thank you very much for your time.

Sincerely,

JOHN McKAY
United States Attorney

Darwin P. Roberts
Assistant United States Attorney

The Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BURNELL MARLEY, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	**NO. C05-0348-RSM** **STIPULATED DISMISSAL OF ACTION** (Filed Feb. 27, 2006)

STIPULATION

Pursuant to Federal Rule of Civil Procedure 41(a)(1), Plaintiff Michael Burnell Marley and Defendant the United States of America hereby agree and stipulate that the above-captioned action shall be dismissed without prejudice and without costs to any party.

DATED this 12 day of Feb., 2006.

PLAINTIFF MICHAEL B. MARLEY

/s/ Michael B. Marley
Mr. Michael Burnell Marley, *pro se*
P.O. Box 82288
Fairbanks, AK 99708

JOHN McKAY
UNITED STATES ATTORNEY

/s/ Darwin P. Roberts
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ORDER

IT IS SO ORDERED.

DATED this _____ day of _____, 2006.

_____
The Hon. Ricardo S. Martinez
United States District Judge

Presented by:

PLAINTIFF MICHAEL BURNELL MARLEY

/s/ Michael B. Marley
By: Mr. Michael Burnell Marley, *pro se*

Presented by:

DEFENDANT UNITED STATES OF AMERICA

JOHN McKAY, UNITED STATES ATTORNEY

/s/ Darwin P. Roberts
DARWIN P. ROBERTS, WSBA #32539
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Attorney for Defendant

The Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BURNELL MARLEY, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	**NO. C05-0348-RSM** **STIPULATED DISMISSAL OF ACTION** (Filed Feb. 27, 2006)

STIPULATION

Pursuant to Federal Rule of Civil Procedure 41(a)(1), Plaintiff Michael Burnell Marley and Defendant the United States of America hereby agree and stipulate that the above-captioned action shall be dismissed without prejudice and without costs to any party.

DATED this _____ day of _____, 2006.

PLAINTIFF MICHAEL B. MARLEY

_____
Mr. Michael Burnell Marley, *pro se*
P.O. Box 82288
Fairbanks, AK 99708

JOHN McKAY
UNITED STATES ATTORNEY

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ORDER

IT IS SO ORDERED.

DATED this 27 day of February, 2006.

/s/ Ricardo S. Martinez
The Hon. Ricardo S. Martinez
United States District Judge

Presented by:

PLAINTIFF MICHAEL BURNELL MARLEY

By: Mr. Michael Burnell Marley, *pro se*

Presented by:

DEFENDANT UNITED STATES OF AMERICA
JOHN McKAY, UNITED STATES ATTORNEY

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No. 09-270

In the Supreme Court of the United States

MICHAEL BURNELL MARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
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QUESTION PRESENTED

Under the Federal Tort Claims Act, a person seeking to file a tort action against the United States must file his complaint in district court "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim" by the relevant agency. 28 U.S.C. 2401(b). The question presented is whether the six-month deadline prescribed by 28 U.S.C. 2401(b) for filing a complaint in district court is subject to equitable tolling.

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In the Supreme Court of the United States

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MICHAEL BURNELL MARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-18) is reported at 567 F.3d 1030. The initial opinion of the court of appeals (Pet. App. 19-34) is reported at 548 F.3d 1286. The order of the district court granting the government's motion to dismiss (Pet. App. 35-44), and its order granting the government's motion for partial reconsideration (Pet. App. 46-48), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2008, and amended on June 1, 2009. A petition for rehearing was denied on June 1, 2009 (Pet. App. 1-2). The petition for a writ of certiorari was filed on

August 31, 2009 (Monday). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) waives the federal government's immunity to suit by individuals "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b). Under the FTCA, any tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

2. Petitioner was treated for prostate cancer by doctors of the Department of Veterans Affairs (VA) at the Puget Sound Healthcare System Hospital. He alleged that he experienced complications resulting in physical injury. Pet. App. 3. In February 2004, he timely filed an administrative claim with the VA. On October 22, 2004, the VA sent petitioner notice of final denial of his tort claim. *Ibid.* The notice informed petitioner's lawyer that any court action "'must be initiated within 6 months after the date of the mailing of this notice of final denial as shown by the date of this letter.'" *Id.* at 3-4.

On March 3, 2005, within the requisite six-month period, petitioner filed a complaint in the district court seeking damages against the United States. Pet. App. 4, 36. Petitioner's lawyers subsequently moved for leave to withdraw from representing him, and the district court granted the motion on January 3, 2006. The dis-

trict court gave petitioner "'notice that he [was] responsible for pursuing [the] action in accordance with the Order Setting Trial Date and Related Dates.'" *Ibid.* (brackets in original).

On January 27, 2006, an Assistant United States Attorney (AUSA) sent a letter to petitioner, stating in part:

> I was told by the staff in our Tacoma office that you might be interested in dismissing your case. In case that's still true, I've taken the liberty of drafting a "Stipulation" (enclosed) that would do that. If you're not familiar with the legal terms involved, and in case you don't want to consult another lawyer (which is entirely your right), I'll briefly state my opinion as to what they mean.
>
> . . . This stipulation provides that your case would be dismissed "without prejudice." That means you could (in theory) bring it again at a later date. The other option would be dismissing "with prejudice," which would mean you could not bring it again. But please be aware that even if you dismiss now "without prejudice," there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again.

Pet. App. 4-5. The AUSA later sent a follow-up letter, which noted approaching deadlines in the case, including an April 10, 2006 deadline for disclosing expert witnesses. *Id.* at 5, 36-37. Petitioner signed the stipulation and returned it to the AUSA. *Id.* at 5. The stipulation and a Proposed Order dismissing the action were filed with the district court, and the court dismissed the action without prejudice on February 27, 2006. *Ibid.*

3. On March 15, 2006, petitioner filed a complaint essentially identical to his first one. Pet. App. 6. The United States filed an answer and moved to dismiss on the ground that the complaint was out of time under Section 2401(b) because it was filed more than six months after the denial of petitioner's administrative claim on October 22, 2004. *Ibid.*; see *id.* at 4. Petitioner did not dispute that his complaint was out of time, but argued, *inter alia*, that the statute of limitations should be equitably tolled because he would not have dismissed his first action had he realized that a refiled action would be untimely. *Id.* at 39; see Pet. 6.

The district court granted the government's motion. Pet. App. 35-44. The court held that petitioner was not entitled to tolling of the statute of the limitations because, though he was presumed to be aware of the six-month statute of limitations, he voluntarily dismissed his first, timely action "for strategic reasons, to gain additional time to locate an expert." *Id.* at 43-44.

The court of appeals affirmed on the ground that the FTCA's six-month statute of limitations is jurisdictional and therefore not subject to equitable tolling. Pet. App. 1-18. Although the court found support for its conclusion in its own precedents, *id.* at 11-13, it principally relied on this Court's decision in *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750 (2008), which held that a similar statute of limitations provision in 28 U.S.C. 2501 is jurisdictional in nature. The court of appeals held that Section 2401's six-month filing deadline, like the one in Section 2501, falls into the category of those "more absolute" statutes of limitations whose purpose is "not so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administra-

tion of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." Pet. App. 9-10 (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753); accord *id.* at 13. Such statutes, the court noted, are generally read to "forbid[] a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* at 10 (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753).

The court of appeals also noted that the structure of 28 U.S.C. 2401 as a whole provides further indication that equitable exceptions do not apply to the six-month limitations period in Section 2401(b). Pet. App. 14-15. In the general statute of limitations provision for suits against the United States, 28 U.S.C. 2401(a), Congress specified that a civil action against the United States "shall be barred" unless the complaint is filed "within six years after the right of action first accrues," but the action of any person "under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." The court of appeals concluded that, "[b]ecause Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include *any* exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly." Pet. App. 15.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court held that "the same rebuttable presumption of equitable tolling applicable to suits

against private defendants should also apply to suits against the United States." *Id.* at 95-96; see also *United States* v. *Brockamp*, 519 U.S. 347, 350, 354 (1997) (explaining that equitable tolling is generally available in suits against the government unless there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply," and concluding that Congress would not have intended to permit equitable tolling of the limitations period for filing tax refund claims in 26 U.S.C. 6511).

In its recent decision in *John R. Sand & Gravel*, this Court clarified its prior cases concerning the availability of equitable tolling in suits against the United States. The Court explained that "[m]ost statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims," and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel*, 128 S. Ct. at 753. On the other hand, the Court explained, some statutes of limitations "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Ibid.* (citations omitted). The Court has often read the time limits of such statutes "as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Ibid.* The Court has typically referred to the time limits in such statutes as "jurisdictional." *Ibid.* Consistent with its precedent, the Court in *John R. Sand & Gravel* concluded that the statute of limitations for filing claims in the United

States Court of Federal Claims, 28 U.S.C. 2501, is "jurisdictional." *John R. Sand & Gravel*, 128 S. Ct. at 753-757; see 28 U.S.C. 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

2. Applying this Court's cases, the court below correctly held that the FTCA's six-month limitations period for filing a tort claim against the United States in federal court, following notice of the administrative denial of the claim, is jurisdictional and therefore not subject to equitable tolling.

As an initial matter, Section 2401(b) states that a tort claim against the United States "shall be *forever barred*" unless "action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b) (emphasis added). That language "sets forth its time limitations in unusually emphatic form." *Brockamp*, 519 U.S. at 350.

As the court of appeals also noted, "Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b). * * * Where Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Pet. App. 14-15 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see *Brockamp*, 519 U.S. at 351 ("§ 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'").

Moreover, as the court of appeals explained, the purpose of the FTCA's six-month limitations period is "not

so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal." Pet. App. 13 (brackets in original) (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753). This Court has long considered the limitations period in Section 2401(b) to be a condition of the government's waiver of sovereign immunity, which the Court would not "extend * * * beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). And as the court noted below, the legislative history of the FTCA supports the conclusion that the limitations period was designed to "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." Pet. App. 13-14 (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966)). The FTCA's six-month limitations period thus belongs to that category of "more absolute," jurisdictional limitations periods that is not subject to equitable tolling. *John R. Sand & Gravel*, 128 S. Ct. at 753.

3. Petitioner asserts (Pet. 7-14) that this Court's review is warranted to resolve a conflict in authority on the question presented. But none of the cases petitioner cites involves the six-month limitations period here at issue, which governs the filing of claims in federal court after notice of the administrative denial of the claim; all of petitioner's cases instead involve the FTCA's two-year time limit for presenting a claim to the appropriate federal agency in the first instance. See *Rakes* v. *United States*, 442 F.3d 7, 24-25 (1st Cir. 2006) (two-year time limit for presenting tort claim to the relevant agency in 28 U.S.C. 2401(b) is not jurisdictional, and therefore subject to equitable tolling); *Santos ex rel. Beato* v. *United States*, 559 F.3d 189, 197 (3d Cir. 2009) (same);

Hughes v. *United States*, 263 F.3d 272, 278 (3d Cir. 2001) (same); *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999) (same); *Glarner* v. *United States*, 30 F.3d 697, 701 (6th Cir. 1994) (same); see also *T.L. ex rel. Ingram* v. *United States*, 443 F.3d 956, 961 (8th Cir. 2006) (holding that two-year limitation period for presentation of claims under Section 2401(b) is jurisdictional, but finding "no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling").

Although the FTCA's six-month limitations period and the two-year limitations period are contained in the same section of 28 U.S.C. 2401, they are not identical. The two-year period is applicable to administrative claims, and is principally designed to provide the relevant agency an opportunity to consider and settle the claim before the claimant seeks judicial review. The FTCA imposes no time limits on an agency's disposition of an administrative claim (although a plaintiff may, at his option, file suit if no action is taken within six months). See 28 U.S.C. 2675(a). In contrast, the six-month period is a strict limitation on the filing of a claim in federal court. It is designed, among other things, to serve a systemic interest in judicial efficiency. See *John R. Sand & Gravel*, 128 S. Ct. at 753.

In the government's view, both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature, and thus are not subject to equitable tolling. But even assuming the FTCA's two-year administrative filing deadline were subject to equitable tolling in appropriate circumstances, it would not follow that its six-month statutory time period for filing complaints in court would also be

subject to equitable tolling. The latter limitations period is short, to ensure particular expedition, and it is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit. Indeed the notice to petitioner expressly informed him that suit must be filed within six months. See Pet. App. 3-4.

The decision below, in short, creates no direct conflict that warrants this Court's intervention. But further review of the question concerning the limitations period for filing an administrative claim with the responsible agency at issue in the cases petitioner cites would not, in any event, be warranted at this time. With the exception of the Third Circuit's decision in *Santos*, *supra*, those cases were decided before *John R. Sand & Gravel*, which substantially clarified the circumstances under which equitable tolling is available under limitations provisions governing monetary claims against the United States. At least until other courts have had the opportunity to consider the issue in light of *John R. Sand & Gravel*, this Court's review would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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NOVEMBER 2009

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No. 09-270

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In The

Supreme Court of the United States

MICHAEL BURNELL MARLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. There Is A Direct Conflict Regarding Whether Section 2401(B) Is Subject To Equitable Limitations

The courts of appeals are sharply divided regarding whether section 2401(b) is jurisdictional and thus bars equitable tolling or estoppel. Respondent contends that this is not a real conflict, because some of those decisions involve the section 2401(b) two-year deadline, while others concerned the section 2401(b) six-month deadline. But no appellate decision has ever held that the two deadlines should be treated differently, and the United States itself has repeatedly insisted that the deadlines are governed by the same rule.

The deadlines at issue are not separate provisions of the Federal Tort Claims Act. Rather they are two clauses in a single sentence:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented.

Whether equitable tolling (or estoppel) is available under section 2401(b) turns on the meaning of the phrase "shall be forever barred." It is exceptionally unlikely that this single phrase actually has two different meanings (one permitting equitable tolling, one not), depending on whether the six-month or two-year

limitation is at issue. That would be like saying (in light of the multiple meanings of the word "hot") that "a bowl of chili is hot if it is heated to 150 degrees, or contains a lot of chili pepper, or was stolen, or is one of the most popular dishes in town."

In the court of appeals in the instant case, the United States drew no distinction between the two deadlines. It correctly observed that since 1991 "the circuits have split on whether the time limitations [plural] contained in the FTCA remain jurisdictional in nature."[1] The government's characterization of that circuit split properly attached no significance to whether the dispute in the cases it cited concerned the two-year deadline or, as in the instant case, the six-month deadline. Of the eight cases relied on by the United States as demonstrating the existence of this "split," seven involved the two-year rule.

A. The Ninth Circuit Held That Section 2401(b) – Not Merely Its Six-Month Deadline – Is Jurisdictional and Bars Equitable Limitations

In its brief in opposition respondent suggests that the Ninth Circuit held only that the six-month requirement is jurisdictional. (Br. Opp. 7). But in the court below the United States repeatedly and correctly described the panel opinion as holding that

---

[1] Brief for Defendant-Appellee, at 49.

section 2401(b) as a whole, not merely one portion of it, is jurisdictional.

> [T]he panel concluded that the jurisdictional character of 28 U.S.C. § 2401(b) was well-established in the Ninth Circuit by clear and longstanding precedent ... and that this earlier precedent served to rebut any *Irwin*-based presumption that 28 U.S.C. § 2401(b) was other than jurisdictional.... [Various] factors led the Court to conclude, independently of past precedent, that 28 U.S.C. § 2401(b) is jurisdictional.... The panel ... cit[ed] numerous cases which hold ... that 28 U.S.C. § 2401(b) is jurisdictional.... [T]he court correctly determined that 28 U.S.C. § 2401(b) is a jurisdictional statute....

(Appellee's Answer to Petition for Rehearing *En Banc*, at 7-8, 14, 16).

Although the particular provision at issue in the instant case is the six-month deadline, the decision of the court of appeals below repeatedly articulated the Ninth Circuit rule that section 2401(b) – not merely one or the other of its deadlines – is jurisdictional. "[W]e must decide whether we have jurisdiction over a claim that does not meet the deadlines [plural] contained in § 2401(b)." (App. 8). "Our more recent cases ... reflect the view that the timing requirements [plural] of § 2401(b) are jurisdictional." (App. 12).[2]

---

[2] See App. 12 ("the requirements of § 2401(b) ... are jurisdictional in nature ... ") (quoting *Blain v. United States*, 552 F.2d 289, 291 (9th Cir.1977)).

"We have long held that § 2401(b) is jurisdictional." (App. 11).[3] "[E]quitable exceptions do not apply to § 2401(b)." (App. 14). "Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b)." (*Id.*). "Congress intended the deadlines [plural] of § 2401(b) to be adhered to strictly." (App. 15).

In holding that section 2401(b) (as a whole) is jurisdictional, the Ninth Circuit explained that "the answer [is] in our own precedent." (App. 11). Of the six Ninth Circuit decisions relied on by the opinion below in holding that section 2401(b) is jurisdictional, four were cases that involved the two-year deadline rather than the six-month deadline at issue in the instant case.[4]

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[3] See also App. 12 ("Timely compliance with section 2401(b) is a jurisdictional prerequisite to maintenance of a FTCA suit") (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)), 15 ("§2401(b) is jurisdictional"), 15 (holding non-precedential the holding in *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir.1996), "that § 2401(b) is not jurisdictional."), 17 (*Alvarez-Machain* "implicitly held that § 2401(b) is non-jurisdictional").

[4] App. 12-13. The cited cases involving the two-year rule were *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.2002), *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983), *Blain v. United States*, 552 F.2d 289, 291 (9th Cir.1977), and *Mann v. United States*, 399 F.2d 672, 673 (9th Cir.1968).

The government urged the court below to adopt precisely that broad rule that section 2401(b) is jurisdictional.

> Whether the time limits of 28 U.S.C. § 2401(b) are jurisdictional can have significant ramifications in FTCA litigation.... Until recently, the courts had held with virtual unanimity that the provisions of 28 U.S.C. § 2401(b) were jurisdictional.... This Circuit has ... stated unequivocally that the FTCA's statute of limitations periods continue to be seen as jurisdictional in nature.[5]

The words "limits," "provisions" and "periods" are all plural. In support of its contention that Ninth Circuit precedent demonstrated that section 2401(b) is jurisdictional, the government relied particularly on Ninth Circuit decisions involving the two-year deadline, despite the fact that the instant case concerns the application of the six-month deadline.[6] In opposing rehearing en banc, the United States insisted that the panel had properly held section 2401(b) jurisdictional because "this Court has consistently held that the FTCA statute of limitations is jurisdictional in nature," citing two Ninth Circuit cases concerning the limitations periods in section 2401(b), one of

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[5] Brief for Defendant-Appellee, at 43-44, 51.

[6] *Id.* at 51-52. Three of the five cases relied on by the government involved the two-year rule. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.2002); *United States v. 87 Skyline Terrace*, 26 F.3d 923, 929 (9th Cir.1994); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir.1995).

which (unlike the instant case) involved the two-year rule.[7]

B. Decisions In Four Circuits Hold That Section 2401(b) – Not Merely Its Two-Year Deadline – Is Not Jurisdictional and Thus Permits Application of Equitable Limitations

Respondent characterizes the decisions in the First, Third, Fifth and Sixth circuits as holding only that the "two-year limit for presenting [a] tort claim to the relevant agency in 28 U.S.C. § 2401(b) is not jurisdictional." (Br. Opp. 8). None of these decisions, however, adopted an interpretation of the two-year rule as such; rather, each of them held that section 2401(b) itself is not jurisdictional, and then applied that general rule to a case which happened to concern the two-year rule. The First and Sixth Circuits have also applied this interpretation of section 2401(b) to cases involving the six-month deadline.

The First Circuit decision in *Rakes v. United States*, 442 F.3d 7, 25 (1st Cir.2006), held that "equitable tolling defenses are applicable in the context of the FTCA," not in the context of the two-year deadline. In its brief in the court below respondent characterized *Rakes* as holding that "equitable tolling

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[7] Appellee's Answer to Petition for Rehearing *En Banc*, at 10-11 (citing *Burns v. United States*, 764 F.2d 722 (9th Cir.1985)).

defenses are available in FTCA cases."[8] The First Circuit's analysis in *Rakes* drew no distinction between the two-year and six-month deadlines. 442 F.3d at 25. In *de Casenave v. United States*, 991 F.2d 11 (1st Cir.1993), the First Circuit held that the equitable tolling rule in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), applies to the six-month deadline in section 2401(b). 991 F.2d at 12 n.2.[9]

The Third Circuit in *Santos v. United States*, 559 F.3d 189, 196 (3d Cir.2009), held that "equitable tolling is possible under the FTCA." The reasoning in *Santos* concerned section 2401(b) as a whole. 559 F.3d at 195-96. The government correctly characterized *Santos* as involving the "question of ... whether the limitations periods [plural] of the Federal Tort Claims Act are jurisdictional and may be expanded by equitable tolling."[10]

The Fifth Circuit decision in *Perez v. United States*, 167 F.3d 913 (5th Cir.1999), clearly covered section 2401(b) as a whole.

> [W]hether the limitations provisions [plural] of the FTCA are jurisdictional – in which

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[8] Brief for Defendant-Appellee, at 49.

[9] "The district court held that, because the six-month statute of limitations was jurisdictional, it had no power to apply principles of equitable tolling to plaintiffs' claim. In light of the Supreme Court's holding in *Irwin* ... , the district court's refusal to entertain plaintiff's tolling argument was erroneous."

[10] Petition for Rehearing and Rehearing *En Banc*, *Santos v. United States*, No. 07-4163 (3d Cir.), at first unnumbered page.

> case equitable tolling could not apply – remains an open question in this circuit.... Section 2401 is a garden variety limitations provision, without the attention to detail in [the tax provision held jurisdictional in *United States v. Brockamp*, 519 U.S. 347 (1997)].... [A]llowing equitable tolling would not create an administrative nightmare for the FTCA regime, which encompasses far fewer claims than might be filed against the Internal Revenue Service. Thus, where the principles of equitable tolling would ordinarily apply, such tolling should be allowed in an FTCA case.

167 F.3d at 915-17. *Perez* described the Eighth Circuit decision in *Schmidt v. United States*, 993 F.2d 639 (8th Cir.1991), which held that section 2401(b) "was not jurisdictional," as having "arrived at the same result we will reach." 993 F.3d at 916. *Schmidt* involved the six-month requirement in section 2401(b), rather than the two-year requirement at issue in *Perez* itself, a distinction that the Fifth Circuit correctly regarded as irrelevant.

The Sixth Circuit decision in *Glarner v. United States*, 30 F.3d 697 (6th Cir.1994), also relying on *Schmidt*, announced an interpretation of section 2401(b) as a whole.

> [T]he V[eterans Administration] ... argues that the doctrine of equitable tolling cannot apply to § 2401(b) because the latter is a jurisdictional statute of limitations that cannot be equitably tolled. This assertion is

> incorrect.... Though *Irwin* dealt specifically with a Title VII statute of limitations, ... the equitable tolling presumption applies to § 2401(b) as well.... Thus, in accord with *Schmidt*, § 2401(b) can be equitably tolled.

30 F.3d at 701. The Sixth Circuit has twice applied *Glarner* to appeals regarding the six-month deadline in section 2401(b). *Brockett v. Parks*, 48 Fed.Appx. 539, 540 (6th Cir.2002); *Warren v. United States*, 2000 WL 1800559 at *1 (6th Cir.2000).

The brief in opposition intimates that the Eighth Circuit decision in *T.L. ex rel. Ingram v. United States*, 443 F.3d 956 (8th Cir.2006), was addressing only the two-year limitation period when it held that equitable tolling is permissible even where a statute of limitations is jurisdictional. (Br. Opp. 9). But *T.L.* was not limited to and contains no specific discussion of the two-year deadline; it holds, rather, that "the rule of equitable tolling applies in FTCA cases ... because Congress intended it to apply." 443 F.3d at 961. In its brief in the court below the United States correctly described *T.L.* as holding that "Congress intended equitable tolling to apply in FTCA cases."[11]

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[11] Brief for Defendant-Appellee, at 51.

C. The Inter-Circuit Conflict Is Direct and Well Established

The government suggests that there are two possible reasons why the six-month limitation period might be jurisdictional even if the two-year limitation period is not. First, respondent notes that the six-month deadline "is short, to ensure particular expedition." (Br. Opp. 10). Second, it points out that the six-month period "is triggered by a specific notice ... which sets a readily identifiable date for the filing of a suit." (*Id.*). The government stresses that "the notice to petitioner expressly informed him that suit must be filed within six months." (*Id.*).

But those very circumstances were present in *Irwin v. Department of Veterans Affairs*, 489 U.S. 89 (1990), which held that equitable tolling is applicable to claims against the United States under Title VII. The applicable provision in *Irwin* required that such an action must be filed "[w]ithin thirty days of receipt of notice of final action taken" by the EEOC, 42 U.S.C. § 2000e-16(c), a period shorter than the six-month rule in section 2401(b). Like the six-month deadline in section 2401(b), section 2000e-16(c) is also triggered by "a readily identifiable date for the filing of a suit." The standard letter sent to the petitioner in *Irwin*, like the letter sent in this case, "expressly informed him that suit must be filed within" the

applicable deadline.[12] The government in *Irwin* relied on these same circumstances in unsuccessfully urging the Court to bar equitable tolling under section 2000e-16(c).[13] If those contentions were insufficient to preclude equitable tolling in *Irwin*, they cannot be sufficient to do so here.

II. There Is No Reason To Delay Resolution of This Inter-Circuit Conflict

The government suggests that resolution of this inter-circuit conflict would be premature "until other circuits have had the opportunity to consider the issue in light of *John R. Sand & Gravel* [*Co. v. United States*, 552 U.S. 130 (2008)]." (Br. Opp. 10). But there is no possibility that further airing of this issue would resolve the conflict.

The Third Circuit has already expressly considered the issue in light of *John R. Sand & Gravel*.

> In reaching our result that equitable tolling is possible under the FTCA, we recognize that the reasoning in certain recent Supreme

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[12] *Irwin v. Department of Veterans Affairs*, No. 89-5867, J.App. at 3.

[13] *Irwin v. Department of Veterans Affairs*, No. 89-5867, Brief for Respondent at 19 ("[B]ecause the time period is triggered by receipt of the notice of the right to sue there is no uncertainty about the claimant's knowledge of his legal remedies, as there may be in the context of the initial filing of the complaint."); see *id.* at 16 (arguing that 30-day limitation period is particularly short).

> Court decisions might call into question whether equitable tolling is available in FTCA claims ... *See John R. Sand & Gravel*.... *Irwin* remains good law, for the court in *John R.* applied but did not overrule *Irwin*....

Santos, 559 F.3d at 196-97. Thus even if the First, Fifth and Sixth Circuits – which now permit equitable tolling – change their interpretation of section 2401(b), there will still be a conflict between the Third and Ninth Circuits.

In order to alter their current construction of section 2401(b), moreover, the First, Fifth and Sixth Circuits would have to actually reject the Ninth Circuit's interpretation of *J.R. Sand & Gravel*. The decision below read *J.R. Sand & Gravel* to mean that a court of appeals should rely on its own precedents in deciding whether a time limitation is jurisdictional.

> Using the principle of stare decisis, the Court [in *J.R. Sand & Gravel*] relied on cases in which it had held that the statute was not one that could be equitably tolled.... We, too, can find the answer in *our own* precedent. *We* have long held that § 2401(b) is jurisdictional.... Just as the Supreme Court in *John R. Sand & Gravel* relied on its past cases to conclude that the statute of limitations at issue there was jurisdictional ... so, too, we are bound by *our own* precedents to hold that the limitations period in § 2401(b) is jurisdictional.

(App. 11-13) (emphasis added). If the First, Fifth and Sixth Circuits applied that same reading, they would conclude that they were "bound by" the precedents in their respective circuits which hold that section 2401(b) is *not* jurisdictional.

Moreover, future level developments regarding whether (in light of *John R. Sand & Gravel*) section 2401(b) is jurisdictional will not alter the rule in the Eighth Circuit in *T.L.*, which holds that equitable tolling is available under the FTCA even though the Eighth Circuit regards section 2401(b) as jurisdictional.

Under the current alignment of the circuits, there is a 5-1 split in favor of tolling in section 2401(b) cases. In the unlikely event that the First, Fifth and Sixth Circuits at some point conclude in light of *John R. Sand & Gravel* that section 2401(b) is jurisdictional, there will still be a 2-4 split regarding the availability of tolling. Because consideration of *John R. Sand & Gravel* clearly is not going to eliminate the current inter-circuit conflict, certiorari should be granted to resolve the issue which clearly will continue to divide the courts of appeals.

III. The Question Presented Is Substantial

Respondent suggests that review by this Court is not warranted because the Ninth Circuit was correct when it concluded that equitable tolling is not available in this case. In the court below, however, the

government contended to the contrary that equitable tolling *is* available in a case under section 2401(b):

> The United States submits that the Court should find that the FTCA's statute of limitations is jurisdictional but subject to equitable tolling in appropriate cases.... We urge the court to find that the FTCA's statute of limitations is jurisdictional but, in the appropriate case, equitable tolling may apply.[14]

The government, of course, is permitted to change its position as to whether equitable tolling is permitted under section 2401(b), as has now occurred. But having done so, the United States cannot plausibly argue that the correct interpretation of the statute is so obvious that review by this Court is unnecessary.

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[14] Brief for Defendant-Appellee at 54-55. The government urged the Ninth Circuit to adopt the rule in the Eighth Circuit decision in *T.L.*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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